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ABSTRACT

This digest focuses on the continuing ambiguities libraries and their users face in dealing with copyright in the digital environment. In the networked digital world, the basic principles of copyright are more difficult to apply. Digital copies are easy to create, modify, and manipulate, they are extremely easy to distribute widely over networks, and they have a transitory nature. Thus, for libraries, traditional functions that depend on the ownership and relative permanence of a copy, like library lending, collection development, and preservation have been radically altered by digital technologies. Once a library or an individual has lawfully acquired a copy of a work, the first sale doctrine of the copyright law allows that the library or individual may exercise another exclusive right of copyright--the right to distribute the copy--without the permission of the copyright holder. First sale enables librarians to loan books or conduct interlibrary loan without committing copyright infringement. Currently, the first sale exception does not transfer to the digital environment. Libraries have had to shift their understanding of collection development from an ownership model to an access model. Since libraries cannot purchase digital materials outright, they must rent the access, and negotiate user terms comparable to the user and library exemptions in the copyright law. Historically, libraries have preserved materials for the use of current and future generations. A major problem now is libraries that license digital materials may not have the contractual right to preserve materials. Copyright aggregators, those industries that hold the rights to scores of copyrighted works, parlayed a major victory in the Digital Millennium Copyright Act with the inclusion of a new chapter to copyright law, called Copyright Protection and Management Systems (Chapter 12). If, according to Chapter 12, users must get permission prior to accessing and using a digital work, fair use is

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impossible without breaking the law. Congress included a provision in the chapter, however, to allow for the technological protection provision to be studied every 3 years in order to evaluate negative impacts on fair use. Libraries remain committed to a balanced copyright law because without it, copyright cannot meet its primary objective, "to advance the progress of Science and the useful arts" for the benefit of the public. (AEF)

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Libraries in Today's Digital Age: The Copyright Controversy

Carrie Russell

Introduction

Libraries are public institutions committed to equitable access and the free flow of information to meet the needs of the public. For libraries, copyright law — through its incentive model, a rich and robust public domain, fair use, and library and user exemptions— aids in ensuring that information is both created and made accessible. While digital technologies and an ever-expanding communication network infrastructure have enhanced creation and wide distribution of information to the public, these same technologies can be used to control or restrict public access to information.

The purpose of the copyright law is to advance the progress of science and the useful arts to benefit the public. It does this by awarding to creators a set of exclusive rights – a limited, statutory monopoly over reproduction, distribution, display, performance, and adaptation of the created work— in order to provide creators an economic incentive to create. The law also sets aside numerous exceptions to creators' right to ensure that users of copyright materials can read and lawfully use the materials in other ways.

In recent years, a copyright legislative battle has ensued between copyright holders (primarily represented by the publishing, entertainment, and software business industries) and those who wish to use or have access to copyright materials (primarily represented by library, educational, and public interest communities). Copyright holders argue that they will not make their copyrighted works available to the public in digital formats unless the law is revised to prevent piracy and protect the marketplace for intellectual property by controlling access and use. Libraries argue that users rights to information should be upheld regardless of technological innovation and digital formats. The big question: Can copyright law continue to balance the interests of both copyright holders and users in the digital environment?

In an attempt to update the law to encompass new digital environments and to allay copyright holders' fears of widespread piracy, Congress passed the Digital Millennium Copyright Act of 1998 (DMCA), an amendment to the copyright law that has been the source of much controversy. Interestingly, the DMCA has not sufficiently addressed the digital environment, because digital technologies continue to evolve at a rapid pace. For example, Congress did not anticipate the development and popularity of file sharing technologies, like Napster. At the same time, the DMCA has furthered a trend to erode the "balance" of copyright law by awarding more rights to copyright holders while restricting the rights of public who wish to enjoy the same user rights to digital information resources as were enjoyed in the print environment. Thus, copyright law and its adaptability in the digital environment continues to be fraught with uncertainty. This ERIC Digest will focus on the continuing ambiguities libraries and their users face in dealing with copyright in the digital environment.

The Copy

In the networked digital world, the basic principles of copyright are more difficult to apply. Copyright law was drafted with print format model in mind. At its heart, the law has always been based on the notion of the "copy." One of the exclusive rights of copyright is the right of reproduction, or the right to make a copy. Before digital technology, a copy was a tangible, physical object that previously was difficult, labor-intensive or too costly to reproduce. Photocopy machines and videocassette recorders made it easie o make copies, but digital technologies go even further.

Digital copies are easy to create, modify and manipulate, and extremely easy to distribute widely over networks. Therefore, digital copies are more difficult for copyright holders to manage and control. Digital copies are also created by accident. When individuals access the World Wide Web, "incidental copies" are automatically created in the random access memory of their computers, at least temporarily.

In addition, digital copies have a transitory nature. Unlike a book you can purchase and own, digital copies you may access today, may not be there tomorrow. Thus, for libraries, traditional functions that depend on the ownership and relative permanence of a copy, like library lending, collection development, and preservation have been radically altered by digital technologies.

First Sale, Then and Now

Once a library or an individual has lawfully acquired a copy of a work, the first sale doctrine of the copyright law (17 U.S.C.§109) allows that the library or individual may exercise another exclusive right of copyright – the right to distribute the copy - without the permission of the copyright holder. First sale enables libraries to loan books or conduct interlibrary loan without committing copyright infringement. Does the first sale exception transfer to the digital environment? Currently, the answer is no.

In the print world, the library could loan copies to patrons. During the loan period, the copy was, obviously, unavailable to any other library user. In the digital environment, digital copies can be loaned to users as well, but without the library temporarily losing access to the copy. Copyright holders fear that libraries will greatly reduce their purchases of digital works since they can easily make exact copies (the right of reproduction)–*and* distribute those copies electronically. The great fear of publishers is that one library will buy an expensive digital work and make unlimited copies for scores of other libraries and library users who wish to avoid purchasing the work themselves.

For libraries, lending material to library users is a core public service. First sale allows libraries to share their lawfully acquired copies with users. Moreover, interlibrary loan is vital to libraries with limited collection development funds. Poorer libraries can borrow copies from bigger libraries to meet user requests. As more materials

become available in only digital formats that cannot be loaned, libraries fear that they will be unable to meet the information needs of users. Libraries cannot afford all materials and rely on sharing. New business models for electronic works are being considered and tested. Already, many libraries are purchasing electronic books and pay prices formulated on the number of lending transactions rather than the purchase of one copy of an electronic book.

Collection Development

Libraries have had to shift their understanding of collection development from an ownership model to an access model. Generally, libraries cannot "purchase to own" materials that are only available in digital formats. Instead, libraries "rent to access" digital materials. This requires an ongoing subscription fee (much like a periodical subscription fee) from the library to license the materials from vendors and publishers.

Unlike a print periodical subscription, however, where the library retains ownership of the periodicals once they are paid for (hence, the long runs of *Time* magazine in so many libraries), libraries lose all access to the digital materials if the subscription is not paid each year. Thus, a library may have access to a full-text database that covers numerous journals, magazines, and periodicals, but only if the annual fee is maintained. If the license fee is not paid, the library loses access to all of the content, even the earlier content that had been licensed and paid for.

Licensing vs. Copyright Law

Licenses are private contracts between two parties and are written to define what the library can or cannot do with licensed materials. Once a license agreement is signed, the agreement takes precedence over any rights libraries or users may enjoy under the federal copyright law. Great care is taken by libraries to negotiate license terms that are in the best interests of their library users, but better terms frequently mean higher subscription fees. Some fees are too expensive for libraries so they may settle for license terms that restrict access, lending and fair use activities, like printing an article from a full-text database for personal use.

Some library associations and consortium have developed licensing guidelines to help libraries work out the best possible license terms. But there is recognition that since the licensor (the vendor or publisher) crafts the initial license terms and generally has more expertise with contracts and negotiations than the licensee, he has a bargaining advantage. In addition, many vendors and publishers are promoting state legislation that would make non-negotiated licenses legally binding agreements. Non-negotiated licenses restrict or eliminate any opportunities for contract bargaining. In sum, since libraries cannot purchase digital materials outright, they must rent the access, and negotiate user terms comparable to the user and library exemptions in the copyright law.

The Preservation Problem

Historically, libraries have preserved materials for the use of current and future generations. Copyright law, in fact, allows libraries to make copies of print and digital materials specifically for preservation purposes. A major question is "who is responsible for the preservation of "digital only" materials?" Libraries that license digital materials may not have the contractual right to preserve materials.

Should vendors be responsible for preservation? Some vendors do not find that it is their best interest to preserve their older digital holdings, due to space and time constraints and ongoing budget obligations. They may also have constraints placed on them from publishers and authors who still retain copyright but allow vendors to digitally distribute their works, not to store the works indefinitely.

Also, if a vendor goes out of business, the company may not have resources to maintain a digital archive. Furthermore, it is unclear how best to preserve digital materials. If digitally archived, care must be taken to select and update technology that will endure into the future. And, who makes the decision to preserve what materials and when should this be done? For example, should web sites be archived? If so, how can one archive sites that are constantly changing?

Technological Protection Measures

Copyright aggregators, those industries that hold the rights to scores of copyrighted works, like the motion picture and recording industries and the publishing community, parlayed a major victory in the Digital Millennium Copyright Act with the inclusion of a new chapter to copyright law, called Copyright Protection and Management Systems (17 U.S.C. Chapter 12). Many library associations, legal scholars, and public interest groups believe this chapter expands the rights of copyright holders to the detriment of the public.

It is now an infringement of copyright (punishable by a fine and jail time) to access a password protected or encrypted work without the prior authorization of the copyright holder. In other words, publishers and other copyright holders can use technological measures to deny access to the public of published works. This allows copyright holders the option of charging a fee for access. Most importantly, copyright holders can use technology to enforce license terms on the public.

Members of Congress were concerned that this provision might lead to a "pay-per-use" environment or unduly restrict fair use. The Fair Use Doctrine is the most wide-reaching user exception to the copyright law since it allows that copyright can be infringed under certain circumstances *without the prior permission of the copyright holder and without paying a fee*. If, according to Chapter 12, users *must* get permission prior to accessing and using a digital work, fair use is impossible without breaking the law. Congress included a provision in the chapter however, to allow for the technological protection provision to be studied every three years in order to evaluate the negative impacts it has on the exercise of fair use.

A Commitment to Balanced Copyright Law

Libraries remain committed to a balanced copyright law because without it, copyright cannot meet its primary objective, "to advance the progress of Science and the useful arts" for the benefit of the public. Knowledge and discovery are dependent on access to information, and equitable access can only be achieved when independent of the ability to pay. Libraries pay for information to share with their communities. As more information becomes available in only digital formats, it is important that the public can enjoy the same information rights they exercised with print formats.

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